United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,342

285

FRANCIS PROCTOR,

Appellant,

v.

~~UNITED STATES OF AMERICA~~,
Sam A. Anderson,
Superintendent, D.C. Jail

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Washington, D.C.
March 2, 1966

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court erred in not holding an evidentiary hearing, to determine the validity of allegations in appellant's petition for a Writ of Habeas Corpus which challenge on constitutional grounds the admissibility at trial of his alleged confession under the law of Jackson v. Denno, 378 U.S. 368, (1964), Muschette v. United States, 378 U.S. 569 (1964) and Curtis v. United States, ___, U.S. App. D.C. ___, 349 F.2d 718 (1965).

2. Whether this court will take cognizance of the fact that although the issue was never raised below, appellant's right to counsel as guaranteed by the Sixth Amendment and elucidated in the doctrine of Escobedo v. Illinois was clearly violated.

3. Whether this court will give Escobedo v. Illinois retrospective effect in the District of Columbia.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,342

FRANCIS PROCTOR,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant is presently serving sentence for conviction of crimes of housebreaking 22 D.C. Code §1801, robbery 22 D.C. Code §2901, and assault with a deadly weapon 22 D.C. Code §502. His conviction was affirmed in 119 U.S. App. D.C. 193, petition for rehearing en banc, denied October 7, 1964, supplemental petition for rehearing en banc denied, February 3, 1965, cert. denied United States Supreme Court, March 1, 1965.

On March 28, 1965, appellant pro se and in forma pauperis filed a "Petition for a Writ of Habeas Corpus". This petition was dismissed without hearing on April 14, 1965. Timely Notice of Appeal was filed and appeal from the United States District Court for the District of Columbia was taken on May 6, 1965. If this Court construes the petition below as one for Writ of Habeas Corpus, then it has jurisdiction in this appeal under 28 U.S.C. §1291. If the petition is construed as a Motion to Vacate Judgment and Sentence under 28 U.S.C. §2255, then this Court has jurisdiction in this appeal under 28 U.S.C. SS1291, 2255.

STATEMENT OF THE CASE

I ARREST

The Manageress of a hotel on 16th Street, Washington, D.C. was choked and severly beaten on May 17, 1963. She identified appellant, a former employee, as her assailant, and a warrant was issued for appellant's arrest. (TR 75-77). At approximately 9:00 p.m. on May 25, 1963, a police officer having knowledge of the outstanding warrant approached appellant at a night club located at 14th and Kenyon Street, N.W. where appellant was drinking with his employer. The police officer, carrying a picture of one Francis Proctor and showing to appellant asked him if he was Francis Proctor. Appellant denied that identity. The police officer asked appellant to step outside the night club. The police officer waited with appellant at a call box at 14th Street, N.W. and Park Road., Washington, D.C. for the arrival of two detectives working on the case, who were summoned (TR 204-206). When the detectives arrived, appellant again denied that he was Francis Proctor and at that time he exhibited as identification, a North Carolina driver's license issued in the name of Don Ameche Miller (TR 214). The officer kept the license after appellant showed it to him. (TR 223). The detectives

asked appellant to accompany them to clear up the question of his identity. Appellant agreed (TR 80). At Fourteenth and Park Road, the detective told appellant that, if it later developed that appellant was the man they were looking for, he would be charged and anything he might say would be used against him (TR 228). He was taken to the home of the victim's sister but after close scrutiny by her was not identified. He was then taken to another night club where he was identified as Tony Proctor (TR 102-103). He was then taken to the Dunbar Hotel, the residence of his mother and stepfather and they identified appellant as Francis Proctor. Appellant was then formally notified by the detectives that he was arrested under the outstanding warrant (TR 82). He was again advised "in a room at the Dunbar Hotel" that anything appellant said would be used against him.(TR 228)

Appellant was taken by the detectives from the Dunbar Hotel to Precinct No. 3. At the precinct house, appellant was "turned...over to the Patrol Signal System Officer whose duty it is to book and search the prisoners" (TR 84). One of the detectives testified that appellant "...was booked and searched and the Patrol Signal System Officer

laid his wallet on the counter and I picked the wallet up...and back in one of the compartments, I pulled out a Social Security card with the name Francis Theodore Proctor and I showed it to [appellant] and appellant then said,'"Yes, I am the guy that you're looking for, I'm the fellow that hit that woman up on Sixteenth Street"'. (TR 84-85)

Appellant was booked at Precinct No. 3 by the Patrol Signal System Officer at 10:55 p.m., May 25, 1963. (TR 83)

II INTERROGATION AND CONFESSION

After he had been booked, the two detectives took appellant upstairs to the detectives' office in the Precinct house. The detectives emerged from the office at 11:50 or 11:55 p.m. with an alleged confession signed by the appellant (TR 88). The format of the "statement" included:

(a) A request to make a statement relative to the crime in question;

(b) "Before making a statement you are advised of your constitutional rights, that you do not have to make a statement, that any such statement may be used against you in the event of a trial, that any statement made by you is made of your own free will without any threats or promises being made to you; after being so informed do you wish to make a

statement? Answer: Yes

(c) the statement of the appellant. 1/

This statement was not merely a repetition of the oral statement made during the booking process. It was instead a detailed recitation of events amounting to housebreaking, robbery, and assault with a dangerous weapon in violation of the District of Columbia Code. 2/

After the alleged confession had been signed, appellant was taken to Precinct No. 1 where he was jailed until the following morning, Sunday. On Sunday, he was placed in a line-up and returned to jail. He remained in jail until he was taken before a Commissioner on Monday morning, two nights and a day after his arrest. (TR 43-44).

III MOTION TO SUPPRESS AND HEARING

Appellant's court-appointed counsel moved prior to trial to suppress appellant's alleged signed confession. The motion was made and argued to the trial court on the basis that the

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1/ The detectives each sat at a typewriter (TR 67-68). "Detective Warner took the statement as the defendant related to him the incident of the day of the crime, and I, meanwhile, was typing up a statement of facts for the Court and a line-up sheet for the Detective Bureau". (TR 86).

2/ (TR 234-236) 22 D.C. Code §§1801, 2901, 501.

delay in presenting appellant to a Commissioner, as required by Rule 5 (a) of the Federal Rules of Criminal Procedure, precluded use by the government of the alleged confession as evidence of guilt. (TR 104-109).

The District Court held a hearing before trial on the Motion to Suppress. A number of witnesses testified at the hearing on the circumstances surrounding the alleged confession. Appellant testified that after he had been arrested and booked, he was taken to an upstairs room at the Precinct house by the two detectives, then "...locked the door and told me if I moved, he was going to drive me through that wall (TR 65), that he could not recall what he had told the detectives after he had been threatened because he had been under the influence of alcohol and drugs at the time he was questioned. 3/

3/ Q. What did you say to those officers, Mr. Defendant at that time you just finished telling us about.

A. Well, I don't recall what I said to them because at that time I was under the influence of alcohol anyway.

Q. You were under what, Mr. Defendant.

A. Under the influence of alcohol and drugs.

Q. And drugs?

, Appellant's companion at the night club on the evening of the arrest testified that appellant and he had been drinking "booze" (TR 21) and that they had a beer and a half of pint of whiskey (TR 30). One of the two detectives who had questioned appellant in the upstairs room denied that appellant had been threatened during questioning. (TR 85)

The District Court denied the Motion to Supress the confession (TR 109-112). The trial judge did not express any findings or conclusions on the voluntariness of the confession in ruling on the Motion or thereafter. The issue of whether the appellant's right to counsel was violated was never raised by counsel of the court.

3/ (cont)

A. Yes Sir.

Q. You remember everything up to the point of what you told them is that your testimony, Mr. Defendant.

A. I remember until I got in that room where the heat hit me.

Q. Oh, the heat hit you when you got in the room and you don't remember anything after that?

A. Very little.

Q. What's that, Mr. Defendant?

A. Very little. (TR 70-71)

IV. TRIAL AND SUBMISSION OF VOLUNTARINESS OF CONFESSION TO JURY

Appellant did not testify before the jury. The government offered as evidence of guilt the alleged confession signed by the appellant. The offer was supported by the testimony of the detective who had testified at the hearing on the Motion to Suppress. The detective testified before the jury that the alleged confession had been obtained from appellant without any threat of physical force. (TR 229).

The confession was received in evidence and read to the jury (TR 233-236). The confession was crucial to establishing the housebreaking and robbery charges. The victim had been unable to testify with particularity about the money claimed to have been taken by appellant (TR 138). The confession obtained in the detectives' office detailed the alleged unlawful entry and the amount of money taken (TR 235). Appellant's trial counsel attempted to cross-examine the detective on appellant's claim at the exclusionary hearing that he had been threatened (TR 236-237). The attempt was withdrawn when the court pointed out that cross-examination would lead to testimony about other statements made by appellant at the hearing. (TR 237-238). 4/

4/ The following colloquy took place out of the presence of the jury:

MR. TITUS: (Assistant United States Attorney) Your Honor, counsel is going into material that was heard out of

Although appellant had not testified, counsel for appellant argued to the jury that the confession had not been voluntary (TR 281,282,285,287). Counsel for the prosecution, responded by pointing out to the jury that not a single witness at the trial had cast doubt on the voluntariness of the confession. 5/

4/ (cont) of the presence of the jury on the question of the voluntariness and admissibility of this confession. He is asking this officer, did he become aware of these accusations made by the defendant at the time of that hearing and during that hearing. Now I___

THE COURT: Well, he is opening up very dangerous territory but you can go back and cross-examine and bring out, if you wish, how he learned about it, the circumstances of his learning about it and so on.

MR. TITUS: I can, your Honor, but it is going to get into the most dangerous ground of what the defendant had to say at the time of that hearing.

THE COURT: I know it, but counsel is opening it up with his _____

MR. KRAMER: (Appellant's counsel) I won't go any further.

THE COURT: All right.

MR. TITUS: I don't want to be prejudicial about the questions, but I am sure that is what is going to result if he keeps on.

THE COURT: Well, I am reasonably sure it is, but you have counsel here who is very able and he must know what he is doing. If he wants to open it up, all right, but apparently now he doesn't, so let's go ahead.

MR. TITUS: Yes, Your Honor (TR 237-238)

Petitioner's trial counsel then withdrew the questions to the detective. (TR 238)

5/ The Assistant United States Attorney said to the jury: "Now, do you know, ladies and gentlemen, this is

V. CONVICTION AFFIRMED, SUBSEQUENT PETITIONS DENIED

The United States Court of Appeals for the District of Columbia heard argument on the sole issue of the admissibility of appellant's confession under the law of Mallory v. United States, 354 U.S. 449 (1954), and the cases which have developed the Mallory Rule. Appellant's conviction was affirmed, one judge dissenting. Proctor v. United States, 119 U. S. App. D.C. 193 (June 25, 1964). On July 7, 1964, appellant filed a petition for rehearing en banc challenging the admissibility of his confession on the grounds of more recent Mallory Rule cases and principally Spriggs v. United States, 118 U.S. App. D.C. 248 (1964). This petition was denied on October 7, 1964.

On October 26, 1964, appellant moved to leave to and did file a supplemental petition for rehearing en banc raising for the first time for the consideration of this Court of Appeals the question of admissibility of appellant's confession under Jackson v. Denno, 378 U.S 368, decided June 22, 1964, three days before publication of the Proctor

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5/ (cont) rather astounding: This lawyer will concede, as he has to as a lawyer, that you as jurors are governed only by what you hear from that witness stand, and yet, he comes before you and tells you that you could not put any credence in the confession which has been received by the Court in evidence, and, may I ask you something ladies and gentlemen of the jury: From what single witness in this case have you reason to doubt the validity of the defendant's statement? (TR 290-291).

opinion and Muschette v. United States, 378 U.S. 569 (1964). While this supplemental petition for rehearing en banc was pending, appellant filed a petition for a Writ of Certiorari in the Supreme Court of the United States on November 5, 1964.

On February 3, 1965, appellant's supplemental petition for rehearing en banc was denied "there not being a majority of judges of this circuit in favor of granting the "rehearing". The matter came before eight judges; four dissented "and would grant rehearing en banc". 6/

On March 1, 1965, the Supreme Court of the United States denied appellant's petition for a Writ of Certiorari

On March 28, 1965, appellant pro se filed a "Petition for Writ of Habeas Corpus" raising the issue of admissibility of his confession under Jackson v. Denno, supra. The petition was dismissed on April 14, 1965. There is no record of a hearing before the District Court Judge; appellant was not present at the time of the decision; no counsel was appointed by the court to represent him.

On April 27, 1965 filed a Notice of Appeal in forma pauperis. Appeal from the United States District Court for the District of Columbia was taken on May 6, 1965. Counsel of record was appointed on January 20, 1966.

6/ Chief Judge Bazelon wrote in his dissent:

"Petitioner's claim appears to have substantial merit, Moreover, I consider that the pendency of the application for Certiorari does not divest us of jurisdiction".

STATUTES INVOLVED

U. S. CONST. AMEND. V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST. AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. §2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time. Unless the motion and the file and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and revoke findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringment of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the

prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the product of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief in behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a Writ of Habeas Corpus.

An application for a Writ of Habeas Corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF POINTS

I. The District Court's failure to hold an evidentiary hearing to determine the validity of allegations challenging the voluntary nature of appellant's alleged confession was erroneous.

1. The Supreme Court of the United States has held that, when the voluntariness of a confession is questioned, a hearing must be held by the judge out of the presence of the jury to determine whether the confession was, in fact, voluntary. Only if found to be voluntary, may the confession then be introduced into evidence before the jury.

2. The Supreme Court has applied this constitutional principle retroactively.

3. This Court has applied this principle retroactively.

4. The procedure employed by the District Court in the trial of this case violated this constitutionally required procedure.

5. The issue of voluntariness was properly before the District Court in appellant's motion for relief in the nature of habeas corpus.

6. Since the trial transcript reflects that appellant's allegations in his petition have substantial merit, the District Court was under an affirmative duty to hold a hearing and make findings of fact and conclusions of law.

II The conduct of police officers in this case violated appellant's right to counsel as guaranteed to him by the Sixth Amendment of the Constitution of the United States.

1. The Supreme Court of the United States has held that:

a. When the investigation of a crime reaches an accusatory stage, a man who is being questioned needs counsel;

b. An investigation becomes accusatory when it "has begun to focus on a particular respect...(who) "has been taken into police custody...";

c. The argument that permitting a suspect to have counsel during interrogation will prevent confession is a strong indication that this is the stage when the suspect most needs counsel. The right to counsel is less meaningful if it begins at a stage when the damage has already been done;

d. The "Constitution ... strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination";

e. "...No system of criminal justice can or should, survive if it comes to depend for its continued effectiveness in the citizens' abdication through unawareness of their constitutional rights."

2. Escobedo v. Illinois should be retroactively applied in this case.

3. The question of the retrospective effect of Escobedo v. Illinois, 378 U.S. 478 (1964) is presently before the Supreme Court.

4. In those Federal Circuits which have decided the issue of retrospectivity in this context, there is a split in authority.

5. This Court of Appeals has not ruled on the question of the retrospective effect of Escobedo v. Illinois.

SUMMARY OF ARGUMENT

A constitutionally required procedure exists whereby the question of the voluntary nature of a confession is submitted to independent judicial analysis before the question becomes evidence for the jury to consider. The absence of a full judicial hearing out of the ~~judges~~ jury's presence and of specific findings of fact and conclusions of law violates the Due Process Clause of the Fifth Amendment.

In this case, the District Judge at trial failed to hold such hearing and make findings of fact and conclusions of law, where the record clearly revealed evidence showing the voluntary nature of appellant's confession.

Thus, the District Judge, sitting in consideration of appellant's petition for Habeas Corpus, erred in having failed to hold a full evidentiary hearing concerning appellant's allegations of involuntariness since his allegations had a clear basis in the record.

Although counsel for appellant has written an argument that appellant's right to counsel under the Sixth Amendment was violated by police officers, he will not argue the issue to the panel, unless the Court pleases otherwise. Counsel's purpose in submitting this argument on the brief is threefold:

1. Counsel construes his duty to his client and to the

court as requiring him to raise all significant and substantial issues regardless of the procedural barriers that would dictate otherwise.

2. The importance of the issue is emphasized by the fact that the question of the retroactivity of Escobedo v. Illinois is presently before the Supreme Court of the United States.

3. Counsel by making the Court aware of the existence of such a substantial issue will ask this Court to order the District Court on remand (on the issue properly before this Court) to expand its consideration of the legal issues of this case to include the relevant questions herein raised.

ARGUMENT

I

The District Court erred in not holding an evidentiary hearing, to determine the validity of allegations in his petition for a Writ of Habeas Corpus (properly construable as a motion for relief under 28 U.S.C. §2255) which challenge on constitutional grounds the admissibility at trial of his alleged confession.

The procedure followed in the District Court to determine the voluntariness of appellant's alleged confession deprived him of due process of law guaranteed by the Fifth Amendment. Jackson v. Denno, 378 U.S. 368 (1964); Muschette v. United States 378 U. S. 569 (1964); Curtis v. United States, _____U. S. App. D.C._____. 349 F.2d 718 (1965). In Jackson v. Denno, this court held that due process requires procedures in the trial court"... fully adequate to insure a reliable and clear cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." 378 U.S. 368, 391. The determination of voluntariness must be made first by the trial court out of the jury's presence before submission of the confession to the jury that is to determine the guilt or innocence of the defendant.

Submission of the issue of voluntariness to the trial jury without an independent judicial determination of it, along with the issue of the truthfulness of the confession and the guilt or innocence of the defendant, is not proper. Jackson v. Denno, 378 U. S 368, 395 (1964).

The Supreme Court noted in Jackson v. Denno, 378 U.S. 368, at 400, that procedures in the District of Columbia for determination of the voluntariness of a confession appear to be constitutionally defective. In Muschette v. United States, 378 U.S. 569 (1964), the Supreme Court vacated and remanded for further proceedings not inconsistent with Jackson v. Denno, a judgment of conviction affirmed by this Court on 116 U.S App. D.C. 240 (1963). [See Green v. United States, ___U.S. App. D.C. ____, 351 F.2d 198 (1965) in which the government confessed error on the grounds of Muschette and this court remanded for proceedings not inconsistent with the Jackson-Muschette principle.] In Curtis v. United States, U. S. App. D.C. _____, 349 F.2d 718 (1965) this Court remanded for further proceedings as required by Jackson v. Denno. Muschette involved a proceeding in which the voluntariness of a written confession was submitted to the trial jury although the confession was claimed to be involuntary. Curtis involved a proceeding in which the voluntariness of a written confession was

submitted to the trial jury although the confession was claimed to be involuntary. Curtis involved a proceeding in which the voluntariness of a written confession was submitted to the trial jury although defense counsel stated that no question was being raised as to voluntariness of the confession but where, during the course of an exclusionary hearing pursuant to the requirements of Mallory v. United States, 354 U.S. 449 (1957), some of the evidence touched in the voluntary nature of the statements.

The issues presented and procedures followed by the United States District Court for the District of Columbia in Muschette, Curtis, and this case are virtually identical. In all three cases, trial took place before the decision of the Supreme Court in Jackson v. Denno, 378 U.S. 368 (1964). In Muschette, and this case, there was a claim that the written confession had not been voluntarily made because of the physical condition of the defendant and threats of physical violence by the police.

In Curtis, this court's opinion states that during the "Mallory hearing", "some of the evidence touched on the voluntary nature of the statements," Curtis v. United States, - U. S. App. D.C. _____, 349 F.2d 718, 719 (1965). In this case clearly there was evidence touching on the voluntary nature of appellant's statements. The District Court in

each case denied motions for suppression of the written confession after hearings at which testimony on circumstances surrounding the confession was presented. In Muschette, Curtis, and this case..."the District Judge did not make on independent judicial finding that the confession was voluntary before submitting the issue of voluntariness to the jury as is now required." Curtis v. United States, supra, at 719.

The District Court in each case submitted the issue of voluntariness to the trial jury along with issues of truthfulness of the confession and guilt or innocence of the defendant. There were claims in each case that the written confessions should have been excluded under Mallory v. United States, 354 U.S. 449 (1957) and no objection was made for submitting to the trial jury withour prior determination of the voluntariness of the confession, the issue of voluntariness along with other issues.

The only substantial factual difference between this case and Muschette establishes decisively the defects of procedures used in the United States District Court for the District of Columbia. In Muschette, the defendant testified before the trial jury, as well as before the District Court at hearing on a Motion to Suppress the confession, about asserted threats of physical violence by police officers.

Defendant Proctor, appellant here, did not repeat before the jury the testimony given before the District Court at hearing on the Motion to Suppress. The procedure followed in the District Court precluded any effective presentation of the issue of voluntariness through testimony by Proctor unless he was to be exposed to cross-examination before the jury in prior convictions and other matters. The dilemma faced by Proctor was accurately summarized by the Supreme Court in Jackson v. Denno, 378 U.S. 368, 389 (Footnote 16)

> Further obstacles to a reliable and fair determination of voluntariness under the New York procedure resulting from the ordinary rules relating to cross-examination and impeachments. Although not the case here, an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of this vulnerability to impeachment by proof or prior convictions and broad cross-examination, both of whose prejudicial effects are familiar. The fear of such impeachment and extensive cross-examination in the presence of the jury that is to pass on guilt or innocence as well as voluntariness may induce a defendant to remain silent, although he is perhaps the only source of testimony on the facts underlying the claim of coercion. Where this occurs, the determination of voluntariness is made upon less than all of the relevant evidence. United States v. Carignan, 342 U.S. 36 (1951).

The only substantial factual difference between this case and Curtis establishes decisively that the profound

regard this Court has articulated for the constitutional rule of Jackson v. Denno should be similarly applied in the instant case. In Curtis this Court said:

> "The record tends to support defense trial counsel's view that no issue of voluntariness was thought to exist but absent a preliminary and independent finding by the District Judge that the confession was voluntary in his view of the record, in its present state, requires us to infer what Jackson v. Denno now demands be explicit.

Curtis v. United States, U.S. App. D.C. _____, 349 E.2d 718, 719 (1965).

In this case, appellant made a claim that he had been threatened by the police. Appellant's counsel attempted at trial to cross-examine a detective in the case as to the merits of such a claim 7/. At the bench conference, trial counsel said he would withdraw his questions to the detective; it appears that he did so because he feared

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7/ This question was entirely permissible even as being within the proper scope of cross-examination since government counsel in direct examination elicited from the detective's testimony that the alleged confession had been obtained from appellant without any threat of physical force. (TR 229). Accord Luck v. United States _____, U.S. App. D.C._____, 348 E.2d 763 (1965). Timely objection to government counsel's questions to a police officer concerning defendant's statements, on grounds inter alia of voluntariness was erroneously overruled. The court said at Page 766:

> In any event, the factual basis of a voluntariness objection are always to be first

that other statements of the appellant would be brought to the jury's attention. Thus, any attempt to ascertain the voluntariness of all of the appellant's statements was thwarted. The colloquy at the bench (TR 237-238) decisively nullified any opportunity for trial counsel to engage in a analysis of the voluntary nature of the appellant's statements. Certainly, in the face of such a record, it is not unreasonable to request that this Court once again, "infer what Jackson v. Denno now demands be explicit". Curtis v. United States, supra.

7/ (cont) explored out of the presence of the jury, with opportunity to both sides to give their versions, unless it is clear that the objection is wholly frivolous.

II

A. Appellant contends that he was denied the right to counsel guaranteed him under the Sixth Amendment of the Constitution. Escobedo v. Illinois, 378 U.S. 478 (1964). Further, appellant contends that the doctrine of Escobedo v. Illinois should be retroactively applied in this case. 8/

8/ Counsel's purpose in submitting this argument in the brief is threefold:

(1) Counsel construes his duty to his client and to the court as requiring him to raise all significant and substantial issues regardless of the procedural requirements that would dictate otherwise.

(2) The importance of the retroactivity of Escobedo v. Illinois is emphasized by the fact that issue is presently before the Supreme Court of the United States. California v. Stewart, No. 584; 62 A.C. 597, modified, 62 A.C. 648, 43 Cal. 201 (1965); Davis v. North Carolina, No. 815; 339 F.2d 770 (4 Cir. 1964); Nusander v. Arizona, No. 759; 401 P.2d 721 (Ariz 196); Vignera v. New York, No. 760; 21 App. Div. 2d 752, 252 NYS 2d 19 (1964) affirmed without opinion, 25 N.Y. 2d 970, 207 N.E. 2d 727 (1965); Westover v. United States, No. 761. Johnson v. New Jersey No. 762; reported below in 43 N.J. 572, 206 A.2d 737, (1965).

(3) Counsel, by making the Court aware of the existence of such a substantial issue will ask this Court to order the District on remand to expand its consideration of the legal issues of this case to include the relevant questions herein raised.

There is nothing in the record of this case which shows that appellant was advised of his right to the assistance of counsel at any stage of the police investigative process. There are at least two statements which should have been excluded from evidence against appellant under the doctrine of Escobedo:

(1) the oral statement made during the booking process when, in response to police confrontation, appellant admitted hitting "that woman up on Sixteenth Street" (TR 84-85).

(2) the signed statement of confession, made in the interrogation room of the Precinct House. (TR 234-236).

All of these statements were made during the "accusatory stage" of the criminal process. In this case, upon the certain establishment of appellant's identity (TR 102-103; 82, 228) "the police had no further occasion to determine if he was the man sought... and, since they were acting under the command of a warrant, had one duty and one duty only; ...to arrest the person...' Morrison v. United States, 104 U.S. App. D.C. 352, 355, 262 F.2d 449, 452. (1958)." Greenwell v. United States, 119 U. S. App. D.C. 43, 45 (Footnote 3) (1964). Clearly the process became accusatory when it had "begun to focus on a particular suspect... [who] has been taken into police custody..."

"Escobedo v. Illinois, supra, 490-491. When the investigation of the crime reached the accusatory stage, appellant was a man in need of counsel. This need for the advice of counsel is compounded in this case by the fact that appellant was under the influence of alcohol and drugs (TR 70-71) at the time he made these uncounselled and incriminating admissions.

The "boiler plate" admonitions of the police that anything appellant would say would be used against him were meaningless. The "Constitution strikes a balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." Escobedo v. Illinois, supra, 488. 9/

Furthermore, the "boiler plate" admonition preceding the statement did not include apprising appellant of his right to counsel. The Court in Escobedo v. Illinois is said:

"...[No] system of criminal justice can or should survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their

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9/ Dean Edward L. Barrett in his amicus curiae brief in People v. Dorado, 42 Cal Rep. 169, 398 P.2d 361 (1965) (on rehearing) asked this question which is also pertinent to this case: [Is] it the duty of the police to persuade the suspect to talk or persuade him not to talk? They cannot be expected to do both".

constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights." 378 U. S. 478, 490 (Footnote omitted)(1964)

Certainly, in the face of such forceful language, any attempt to distinguish this case from Escobedo on the ground that in this case appellant made no request for counsel and counsel made no request to see him would be frivolous. Furthermore, appellant, an indigent youth, had not had counsel appointed to represent him. Thus, the argument that permit a suspect to have counsel during interrogation will prevent confessions is a strong indication that this is the stage when counsel is most needed by the accused. The right to counsel is less meaningful if it begins at a stage when the damage has already been done. What is more, the trial itself is reduced to nothing more than an appeal from interrogation.

B.

The Doctrine of Escobedo v. Illinois should be retroactively applied by the Court.

Escobedo should be given retroactive application under the same rationale the Supreme Court employed in the following cases:

(a) Griffin v. Illinois, 351 U. S. 12 (1956) was made retrospective in Eskridge v. Washington State Prison Board, 357 U. S. 214 (1958);

(b) Gideon v. Wainwright, 372 U. S. 355 (1963) was made retrospective in Doughty v. Maxwell, 376 U. S. 202 (1964);

(c) Jackson v. Denno, 378 U. S. 368 (1964) was made retrospective in Muschette v. United States, 378 U. S. 569 (1964). In each of these cases, the Supreme Court rule of retrospectivity that "we applied went to the fairness of the trial - the very integrity of the fact-finding process." Linkletter v. Walker, 381 U. S. 618, 639, (1965); Tehan v. Shott, __U. S. ___, 34 LW 4095 (1965) [The same rationale is applicable to the Supreme Court's retroactive application of Massiah v. United States, 377 U. S. 201 (1964) in McLeod v. Ohio, 381 U. S. 356 (1965)] "The Escobedo rule fits into this categorization. "Collins v. Beto, 348 F2.d 823, 831 (5th Cir. 1965); Miller v. Warden, 338 F2.d 201 (4th Cir. 1965) Contra: United States, ex rel. Walden v. Pate, 350 F2.d 240 (7th Cir. 1965).

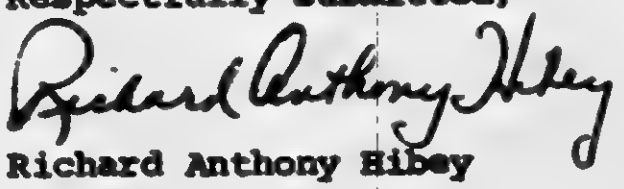
CONCLUSION

WHEREFORE, appellant requests this Court to reverse the judgment of the District Court which dismissed appellant's petition for Writ of Habeas Corpus and remand to the District Court for a hearing, pursuant to 28 U.S.C. §2255, not inconsistent with Jackson v. Denno.

Appellant further requests this Court to rule that Escobedo v. Illinois be given retrospective effect in the District of Columbia.

Appellant further requests this Court to order that the issue of the violation of appellant's right to counsel under the Sixth Amendment be heard at the remand hearing.

Respectfully submitted,



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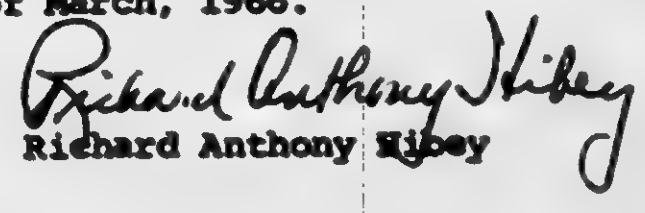
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief for appellant has been personally served upon the Office of the United States Attorney, United States Courthouse, Washington, D.C. this 2nd day of March, 1966.



Richard Anthony Hibey

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,342

FRANCIS T. PROCTOR, APPELLANT

v.

SAM A. ANDERSON, Superintendent, District of Columbia Jail, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
THEODORE WIESEMAN,
Assistant United States Attorneys.

H.C. No. 144-65

QUESTIONS PRESENTED

1) Whether in a collateral attack on his conviction appellant was entitled to an evidentiary hearing on the voluntariness of statements introduced against him at trial, when he received a full pre-trial hearing on whether the statements violated the *Mallory* rule and when he chose not to challenge voluntariness during the hearing, at trial, or on direct appeal?

2) Whether appellant can raise *Escobedo* v. *Illinois* for the first time on appeal?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,342

FRANCIS T. PROCTOR, APPELLANT

v.

SAM A. ANDERSON, Superintendent, District of Columbia Jail, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE [1]

Appellant is serving a sentence imposed on October 4, 1963, by the Honorable George L. Hart, Jr. after a jury

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[1] The record filed with the Clerk of the Court consists of the original record of the habeas corpus proceedings below (H.C. 144-65), the original record of appellant's conviction (Cr. No. 578-63), and the transcript of testimony introduced at the pre-trial hearing to suppress statements and at the trial. In addition, we have referred to this Court's files in No. 18,187, the record of appellant's direct appeal from his original conviction.

had convicted appellant of housebreaking, robbery, and assault with a dangerous weapon (22 D.D. Code §§ 502, 1801, and § 2901).[2] The instant appeal is from a denial of a petition for a writ of habeas corpus challenging the original conviction.

Hearing of Motion to Suppress Evidence

Before trial, counsel for appellant, an attorney from the Legal Aid Agency, filed motions on July 25 and August 9, 1963, to suppress all statements made by appellant and to dismiss the indictment. Relying on *Wong Sun* v. *United States*, 371 U.S. 471 (1963), and *Mallory* v. *United States*, 354 U.S. 449 (1957), the motions alleged that the statements were the product of an unlawful arrest and an unlawful detention; and relying on *In re Fried*, 161 F.2d 453 (2d Cir.), *cert. denied in part*, 331 U.S. 858, *cert. dismissed in part*, 332 U.S. 807 (1947),[3] appellant asked that the indictment be dismissed because the illegally-obtained statements had been considered by the jury.

The motions were heard on the first day of trial before the jury was selected. At the beginning, defense counsel said that both motions were based on *Mallory*. Appellant and three witnesses testified for the defense, and a detective testified for the government. The testimony showed that a plainclothes policeman, who had a snapshot of appellant and who knew that a warrant for appellant's

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[2] Appellant received consecutive sentences of five to fifteen years on the housebreaking count and forty months to fifteen years on the assault count. On the robbery count, he received a sentence of five to fifteen years that ran concurrently with the other counts.

[3] *Fried* held that confessions obtained in violation of constitutional rights could be suppressed before an indictment was returned. Judge Frank wrote a partial dissent in which he would have allowed pre-trial suppression of confessions obtained in violation of any federal statute, but the court specifically limited its holding to constitutional grounds. 161 F.2d at 460. The case has been accepted in many jurisdictions, including our own, as authority for suppressing unconstitutional confessions anytime before trial. *Smith* v. *Katzenbach*, —— U.S. App. D.C. ——, 351 F.2d 810, 815 (1965).

arrest was oustanding, saw appellant in a bar about 9:30 p.m. eight days after the crime. After denying his true name and producing false identity cards in the name of Don Ameche Miller, appellant agreed to go with the officer "to get it straightened out" (Tr. 34). Outside the bar, appellant spoke with two detectives who advised him that they had an arrest warrant charging assault with a dangerous weapon, that he would be arrested if he were the man named in that warrant, and that anything he said could be used against him. Appellant agreed to go with the two detectives to find someone who could say positively whether or not he was the person named in the warrant. After driving to two places where identification was inconclusive, the detectives took appellant to the home of his parents, who identified him immediately. The detectives placed appellant under arrest, advised him again that anything he said could be used against him, and took him to the precinct. Throughout the automobile ride, the detectives never questioned appellant about the offense. (Tr. 17-18, 33-42, 50-61, 75-83, 88-90, 95-97).

Appellant was booked at the precinct at 10:55 p.m. While standing at the counter being booked, he was shown a social security card in his true name found in his wallet. He said, "Yes, I'm the guy that you're looking for, I'm the fellow that hit that woman up on Sixteenth Street" (Tr. 85). Then appellant went with the two detectives upstairs to their office. While the one detective typed two police forms,[4] the other detective typed a state-

[4] At the time of appellant's arrest, the detective in charge of the case was required to complete two forms—the P.D. 163 and the P.D. 111. The P.D. 163, entitled "Statement of Facts" contains a summary of the offense, the evidence discovered, and the names and addresses of witnesses. One copy of that form is sent to the statistical branch at police headquarters and becomes the department's permanent record of the case; a second copy remains at the precinct in the case file and is used by the detective in refreshing his recollection and in preparing the case for court; and a third copy is supplied to the Office of the United States Attorney where, in most instances, it becomes the Office's sole memorandum of the evidence

ment as appellant dictated it. At 11:50 p.m. appellant signed the written statement and returned to the precinct cell block to await transportation to police headquarters for photographing and fingerprinting. Before appellant had begun to dictate his confession the one detective read to appellant a printed statement embodied in the written confession that he later signed, which warned "that you do not have to make a statement, that any such statement may be used against you in the event of a trial, that any statement made by you is made of your own free will without any threats or promises being made to you" (Tr. 234). (Tr. 42-44, 61-65, 83-88, 233-236).

Testifying on direct examination, appellate related in detail all the events occurring that evening, except that he did not mention having made any statements to the detectives (Tr. 32-46). During cross examination, appellant testified that when he entered the detectives' office at the precinct, one detective "locked the door and told me if I move, he was going to try to drive me through that wall" (Tr. 65).[3] Then, the two detectives "took me to the rest room and come back and started typing, asking me questions" (Tr. 67). According to appellant, he could remember answering several questions unrelated to the crime but not any questions about the crime itself (Tr. 68-70). At that point, the cross-examination proceeded as follows (Tr. 70-71):

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at all stages of misdemeanor cases and all stages before indictment in felony cases. This statement is the one most frequently shown to defense counsel at trial pursuant to the Jencks Act, 18 U.S.C. § 3500. The other form, the P.D. 111, entitled "Statement for Lineup" contains the accused's vital statistics, including such information as his date and place of birth, the names and ages of near relatives and friends, his employment and military history, the places where he has resided, and his criminal record. This information is sent to police headquarters, where—together with the accused's fingerprints and photograph—it is catalogued in the criminal records' system, which is the most basic and most frequently used tool in criminal investigation.

[3] The detective testified that no such threat was ever made (Tr. 85).

Q. What did you say to those officers, Mr. Defendant, at that time you just finished telling us about?
A. Well, I don't recall what I said to them because at the time I was under the influence of alcohol, anyway.[6]
Q. You were under what, Mr. Defendant?
A. Under the influence of alcohol and drugs.
Q. And drugs?
A. Yes, sir.
Q. And alcohol?
A. Yes, sir.
Q. You remember everything up to the point of what you told them, is that your testimony, Mr. Defendant?
A. I remember until I got in that room where the heat hit me.
Q. Oh, the heat hit you when you got in the room and you don't remember anything after that?
A. Very little.
Q. What's that, Mr. Defendant?
A. Very little.
Q. Very little. I don't think I am going to bother asking you any more questions, Mr. Defendant.

After all the testimony had been heard, defense counsel argued that the statements violated *Mallory* (Tr. 104-108) and concluded by saying, "I think the record is clear as to the circumstances and I think this is a clear violation of statute 5(a) and of *Mallory*, therefore, should be suppressed" (Tr. 108-109). The court denied the motion (Tr. 109). Then defense counsel, for purposes of the record, argued his motion to dismiss the indictment. When asked whether *In re Fried*, *supra*,[7] applied only to confessions obtained by unconstitutional means, defense counsel conceded that *Mallory* did not rest on constitutional grounds, but asked the court to extend the *Fried* case be-

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[6] A defense witness at the hearing, who had been with appellant in the bar immediately before the plainclothes officer approached, testified that appellant was not drunk (Tr. 30).

[7] See footnote 3, *supra*.

yond constitutional violations to *Mallory* violations (Tr. 109-111). At no time during the hearing did defense counsel suggest that appellant's statements were involuntary.

Trial

Appellant's statements were received into evidence at the trial over *Mallory* objections (Tr. 218-221, 224, 233, 251-254). During direct examination, the detective who produced the statements testified that neither threats nor physical force was used at anytime (Tr. 229). Defense counsel opened his cross-examination of the detective by asking, "Did there come a time when you became aware that Mr. Proctor accused you of threatening to knock him through the wall?" (Tr. 236). Government counsel objected, and at the bench, the trial judge observed that appellant had a right to ask the question but that he was "opening up very dangerous territory." (Tr. 237-238). Defense counsel withdrew the question (Tr. 238).*

At the conclusion of the testimony, the trial judge asked counsel for special requests for jury instructions and outlined the instructions that he proposed to deliver. Defense counsel requested an instruction on appellant's constitutional right not to testify and expressed satisfaction with the court's proposed instructions, which did not include a charge on the voluntariness of the statements (Tr. 265-266).

During the entire trial, defense counsel never challenged the voluntariness of the statements† until his

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*The bench conference appears in its entirety in App. Br. 10-11, footnote 4.

†In fact, the only time that defense counsel ever mentioned voluntariness was in an answer to the court's inquiry about why it was necessary to know the name of an informer, at which time counsel said (Tr. 208):

> I think while [the detective] is on the witness stand I can certainly inquire as to the arrest and, certainly, if Government counsel plans to introduce any confessions, I can always argue

closing argument to the jury, during which he made the following references: (1) that one sentence in the written statement was not phrased in language that a guilty man would have used (Tr. 281-282); (2) that a guilty man would not have voluntarily accompanied the police to confirm his identification and later confessed (Tr. 283-285); (3) that the only evidence of guilt was "an alleged voluntary confession and identification made the day of the crime" (Tr. 285); (4) that "The statement alleged to be voluntary as a confession, were [*sic*] made in circumstances which I submit to you were all but voluntary in such custody of the police" (Tr. 286); and at the very end of the argument, (5) "that all the Government has is this alleged confession as being voluntary and this, they say, will prove the guilt. I submit that it does not and should not" (Tr. 286-287).

At the end of defense counsel's argument, the court called counsel to the bench to discuss an unrelated matter (Tr. 287-288). After the discussion the following occurred (Tr. 288-289):

> THE COURT: While we are up here, do you want me to give any instructions as to how the jury should consider a confession, whether it is freely and voluntarily made, and so on?
>
> MR. KRAMER: Yes, Your Honor.

Accordingly, the court instructed the jurors not to consider the confession if they found it involuntary (Tr. 298-300).

Direct Appeal

Appellant appealed his conviction to this Court. His court-appointed counsel raised only one issue—whether the statements were obtained in violation of the *Mallory* rule. (See App. Br. in No. 18,187). Counsel on appeal found no merit in trial counsel's contentions under *In re*

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the involuntariness of it for whatever the jury may take as far as weight. I think I may have to make some argument to them. That is my responsibility.

Fried [10] because, as he informed this Court, "The charge in this case is not that a constitutional right has been usurped, but that a confession was obtained in violation of the Federal Rules of Criminal Procedure." (App. Br. in No. 18,187, p. 14). On June 25, 1964 (three days after the Supreme Court decided *Jackson* v. *Denno*, 378 U.S. 368, and *Escobedo* v. *Illinois*, 378 U.S. 478), this Court, with one judge dissenting, found appellant's *Mallory* contentions without merit and affirmed his conviction. (119 U.S. App. D.C. 193, 338 F.2d 533). On July 10, appellant filed a petition for rehearing *en banc*, again raising only *Mallory* objections. This Court denied the petition on October 7. Three weeks later, on October 26, appellant filed a supplemental petition for rehearing, contending that the court had never ruled on the voluntariness of his statements as set forth in *Jackson* v. *Denno*, *supra*. On February 3, 1965, this Court, with four judges dissenting, denied the supplemental petition (120 U.S. App. D.C. 35, 343 F.2d 317); and on March 1, 1965, the Supreme Court denied a petition for a writ of certiorari (380 U.S. 917).

Habeas Corpus Proceedings

On March 29, 1965, four weeks after the Supreme Court refused to review the conviction, appellant filed a petition for a writ of habeas corpus, alleging *Jackson* v. *Denno*, *supra*, as the sole basis for relief. Instead of treating the petition as a motion for relief under 28 U.S. 2255 and referring it to the sentencing judge (Judge Hart),[11] the district court referred the petition to Judge Luther W. Youngdahl, who denied it on April 14, 1965, and granted leave to appeal *in forma pauperis* on April 30, 1965.

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[10] See footnote 3, *supra*.

[11] See discussion at pp. 10-11, *infra*.

STATUTE INVOLVED

Title 28 U.S.C. § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

SUMMARY OF ARGUMENT

Appellant's petition for a writ of habeas corpus should be treated as a motion to vacate sentence under 28 U.S.C. § 2255.

Appellant was not entitled to an evidentiary hearing on the voluntariness of his statements under *Jackson* v. *Denno*, 378 U.S. 368 (1964), because he did not question voluntariness at his trial. Nor was appellant entitled to a hearing under established principles of collateral relief; for the files and records show that he received a full hearing before trial on *Mallory* objections, at which all the facts surrounding the statements were developed, and that the claim of involuntariness is entirely without merit. In any event, appellant deliberately bypassed the issue of voluntariness at trial and on direct appeal.

Appellant cannot assert rights under *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), for the first time on appeal. A decision by this Court before both sides have had an opportunity to plead the facts would be hypothetical and abstract.

ARGUMENT

I. Appellant's petition for a writ of habeas corpus should be treated as a motion to vacate sentence under 28 U.S.C. § 2255.

28 U.S.C. § 2255 expressly provides that it is the exclusive remedy, as long as the remedy is adequate, for a federal prisoner contesting the legality of his detention.

Accordingly, appellant's *pro se* petition for a writ of habeas corpus should be treated as a Section 2255 motion. At the present stage of the proceedings, the distinction between habeas corpus and Section 2255 is academic, but any future action in this case should be directed to the sentencing judge instead of to the judge who ruled on the petition below.[12]

II. Appellant is not entitled to an evidentiary hearing on the voluntariness of his incriminating statements because he chose not to make voluntariness an issue at his trial or on direct appeal.

(Tr. 17-18, 32-71, 74-92, 95-100, 104-111, 215-254, 265-266, 274-289, 298-300).

Relying on *Jackson* v. *Denno*, 378 U.S. 368 (1964), appellant contends (App. Br. 22-28) that the district court should have conducted an evidentiary hearing on the voluntariness of the statements used at the trial. The rule in *Jackson* has no application to this case. The rule created a procedural right to a fair hearing at the trial on the voluntariness of statements, when an accused chooses to make voluntariness an issue. In the words of this Court, sitting *en banc*, Jackson provided "*when the voluntariness of a confession is questioned*, a hearing must be held by the judge out of the presence of the jury to determine whether or not the confession was, in fact, voluntary" (emphasis supplied). *Green* v. *United States*, 122 U.S. App. D.C. ——, 351 F.2d 198, 201 (1965).[13] The cases are in uniform agreement that a prisoner can raise *Jackson* on collateral attack, even though he did not

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[12] Under the district court's Rule 9, habeas corpus petitions are referred to the judge sitting in motions court, while Section 2255 motions are transmitted to the trial judge.

[13] In *Jackson*, the Supreme Court defined the right as a "constitutional right at some stage in the proceedings *to object to the use of the confession* and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession" (emphasis supplied). 378 U.S. 376-377.

specifically request a hearing and ruling by the court absent the jury, provided that the prisoner challenged and litigated voluntariness at the trial.[14]

In the present case, appellant never contested voluntariness at trial, even though he had every opportunity to do so. He was represented by the Legal Aid Agency,

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[14] *Boles* v. *Stevenson*, 379 U.S. 43 (1964); *Jackson* v. *Denno*, *supra* at 371-374; *Green* v. *United States*, *supra*; *Curtis* v. *United States*, —— U.S. App. D.C. ——, 349 F.2d 718 (1965); *Luck* v. *United States*, —— U.S. App. D.C. ——, 348 F.2d 763, 765 (1965); *Pea* v. *United States*, 116 U.S. App. D.C. 410, 324 F.2d 442 (1963), *vacated*, 378 U.S. 571 (1964); *Muschette* v. *United States*, 116 U.S. App. D.C. 239, 240, 322 F.2d 989, 990 (1963), *vacated*, 378 U.S. 569 (1964). To be sure, the opinion in *Curtis* v. *United States*, *supra*, on which appellant places heavy reliance, does not indicate that voluntariness was in issue at the trial; but the opinion, being only a *per curiam* disposition, did not state the facts in detail. The facts before the Court in *Curtis* are shown from the following statement, which we quote from our brief in that case (Brief for Appellee in No. 18,737, pp. 17-18, footnote 17):

> At first, appellant's trial counsel disclaimed any intention of arguing that the admissions made to Detective Lewandowski were involuntary. He plainly stated that he would object to the statements only on *Mallory* grounds and on the ground that they were made without advice of counsel (Tr. 268.) At the conclusion of the hearing, arguing against admissibility, counsel reviewed testimony indicating that appellant was either 18 or 19 years old, that he was unaware that he would be charged with a capital offense, that the detective was a skilled police officer familiar with the *Mallory* rule and aware that it was a capital case, and that there was a conflict in the testimony as to whether appellant had been warned of his rights. Counsel then agreed with the court that this evidence would be relevant to the question whether the confession was voluntarily made, although he said he would not suggest that physical coercion was used. (Tr. 410.)
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> After a full discussion of the *Mallory* rule, the applicable pre-*Jackson* v. *Denno* legal standards, and the facts adduced at the hearing (Tr. 410-26), government counsel agreed that the issue of voluntariness should be submitted to the jury (Tr. 420, 422). The court then found that "there [was] ample evidence upon which the jury might, if they see fit to do so, conclude that the statement was voluntarily made * * *" (Tr. 425). Consequently, the court charged the jury, without objection, on the standards it should apply in determining whether or not to consider as evidence the testimony regarding appellant's admissions (Tr. 557-59, 574, 580).

which has a staff of investigators. He had a full hearing before trial that explored in searching detail every circumstance underlying his statements. Throughout the hearing, defense counsel expressly limited the challenge to *Mallory*. In fact, since defense counsel's only authority for even holding a pre-trial hearing to suppress statements was *In re Fried*,[15] a case that applied to involuntary confessions only, if there had been any doubt about the voluntariness of appellant's statements, defense counsel would have coupled a voluntariness attack with his *Mallory* attack. When put to the test, defense counsel shunned the voluntariness claim and asked the court to extend *Fried* to *Mallory* violations. Throughout the trial, appellant never suggested that voluntariness was an issue,[16] except for a few passing references in his jury argument, which suggested no more than that a guilty man would not have confessed. After the argument, the trial judge asked defense counsel if he wished a jury instruction on voluntariness. Since there was no evidence

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[15] See footnote 3, *supra*.

[16] We cannot agree with appellant (Br. App. 27-28) that defense counsel's attempt to cross-examine the detective on voluntariness was blocked by the court's observation that other portions of appellant's pre-trial testimony would become admissible at the trial (Tr. 236-238). Defense counsel asked the detective, "And did there come a time when you became aware that *Mr. Proctor said* that when you took him up to the room you locked the door and that time made the threat to him?" (emphasis supplied). (Tr. 237). In framing the question in that manner, defense counsel put before the jury evidence that appellant had given out of the jury's presence. The question was improper unless defense counsel intended to prove as part of his own case that appellant made such a statement. *Smith* v. *United States*, No. 19,629, decided March 9, 1966. The government, of course, could rebut such evidence by showing the circumstances in which the statement was made. It was the form of defense counsel's question that would have made appellant's testimony at the hearing an issue at the trial. Nothing prevented defense counsel from examining the detective or any other witness about threats or other indicators of involuntariness, provided that the questions did not ask the witnesses to tell the jurors what appellant said at the hearing. Defense counsel, however, did not choose to examine any witnesses about voluntariness.

in the case of voluntariness, appellant had no right to such an instruction. *Butler* v. *United States*, —— U.S. App. D.C. ——, 350 F.2d 788, 789 (1965). Defense counsel could not introduce new evidence during his jury argument, and voluntariness did not spring up as an issue because the trial court ruled for appellant too favorably. Only after counsel on direct appeal had assured this Court that no question of voluntariness lay in the case, and after this Court had denied a petition for rehearing *en banc*, did appellant stretch his argument and attempt to sneak under the tent flaps of the newly-discovered *Jackson* v. *Denno*. Respectfully, we submit that in this case the record suggests that from the beginning appellant had but one defense—*Mallory*—and the only reason he went to trial was to preserve that question for appeal.

Placing *Jackson* v. *Denno* to one side, appellant could still claim an evidentiary hearing under the law surrounding the availability of collateral relief. Whenever a prisoner alleges an error that is cognizable on collateral attack, the district court must hold a hearing to resolve factual issues unless "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *Sanders* v. *United States*, 373 U.S. 1 (1963). The record in this case contains a full hearing on the circumstances under which the statements were made. All the facts are a matter of record and show conclusively that the statements were voluntary. *Sanders* v. *United States*, *supra* at 15; *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963).[17] In addition, the files and records conclusively show that appellant "deliberately bypassed" the question of voluntariness at the trial and on appeal. *Fay* v. *Noia*, 372 U.S. 391, 438 (1963). It is now settled that an issue is waived when the record shows

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[17] Once a prisoner has had a full hearing at trial, he is not entitled to a second hearing on collateral attack unless he shows newly-discovered evidence or some defect in the original hearing. *Townsend* v. *Sain*, *supra* at 312. This, appellant has not done.

that defense counsel made a deliberate choice not to raise the issue for tactical reasons or otherwise. *Henry* v. *Mississippi*, 379 U.S. 443, 449 (1965); *Nelson* v. *California*, 346 F.2d 73 (9th Cir. 1965); *Wilson* v. *Gray*, 345 F.2d 282 (9th Cir.), *cert. denied*, 382 U.S. 919 (1965) (alternative holding). As we have argued (*supra*, pp. 12-14), the record in the present case shows more than oversight or omission: it shows that both of appellant's attorneys, one at trial and the other on appeal, made considered determinations that a voluntariness argument was so lacking in merit as not to deserve mention.

III. Appellant's claim under *Escobedo* v. *Illinois* cannot be raised for the first time on appeal.

Raising the issue for the first time on appeal, appellant contends (App. Br. 29-33) that *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), should be applied retroactively to his case. However, new issues cannot be raised for the first time on appeal from a denial of relief in a collateral proceeding. *E.g.*, *Lampe* v. *United States*, 110 U.S. App. D.C. 69, 288 F.2d 881 (1961) (*en banc*), *cert. denied*, 368 U.S. 958 (1962) (alternative holding). Application of the *Lampe* rule is particularly appropriate in the present case where the uncertainty about the scope and retroactivity of *Escobedo* will soon be resolved by the Supreme Court.[18] Moreover, neither appellant nor the government

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[18] Five cases are awaiting decision by the Supreme Court: *Stewart* v. *California*, 382 U.S. 937 (1965), *granting cert. in* 43 Cal. Rptr. 201, 400 P.2d 97; *Johnson* v. *New Jersey*, 382 U.S. 925 (1965), *granting cert. in* 43 N.J. 572, 206 A.2d 737; *Miranda* v. *Arizona*, 382 U.S. 925 (1965), *granting cert. in* 98 *Ariz.* 18, 401 P.2d 721; *Vignera* v. *New York*, 382 U.S. 925 (1965), *granting cert. in* 15 N.Y.2d 970, 207 N.E.2d 527; and *Westover* v. *United States*, 382 U.S. 924 (1965), *granting cert. in* 342 F.2d 684 (9th Cir.). The case of *Johnson* v. *New Jersey* presents the issue of retroactivity, although it is possible that the case could be decided on other grounds without reaching the issue. See 34 U.S.L. Week 3300 (Mar. 8, 1966). There is no merit to appellant's contention (App. Br. 33) that the Supreme Court held that *Massiah* v. *United States*, 377 U.S. 201 (1964), was retroactive in the *per curiam* reversal of *Mc-*

has pleaded the facts on which reliance will be placed. A decision by this Court without a factual basis would be hypothetical and abstract. Depending on the allegations of fact presented to the district court, an evidentiary hearing might not be necessary even if *Escobedo* were to be applied retroactively. Since the Court's disposition of the instant appeal will not bar appellant from presenting a new 2255 motion with *Escobedo* allegations (see *Sanders* v. *United States*, 373 U.S. 1, 15 (1963)), we respectfully submit that the Court should apply the *Lampe* rule and affirm the judgment below.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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Leod v. *Ohio*, 381 U.S. 356 (1965). That case was pending decision in the Supreme Court before *Massiah* was decided. See *McLeod* v. *Ohio*, 378 U.S. 582 (1964).

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